

MAYOR & COUNCIL AGENDA COVER SHEET

MEETING DATE:

March 17, 2002

RESPONSIBLE STAFF:

**Jennifer Russel, Director
Planning and Code
Administration**

AGENDA ITEM:

(please check one)

	Presentation
	Proclamation/Certificate
	Appointment
X	Public Hearing 3/17/03
	Historic District
	Consent Item
	Ordinance
	Resolution
	Policy Discussion
	Work Session Discussion Item
	Other:

PUBLIC HEARING HISTORY:

(Please complete this section if agenda item is a public hearing)

Introduced	
Advertised	2/26/03
	3/5/03
Hearing Date	3/17/03
Record Held Open	
Policy Discussion	

TITLE: T-357

An Ordinance to Amend Chapter 24 of City Code (City Zoning Ordinance), Article VIII, Entitled "Amendment Procedure," so as to create New Section 24-196.1, Entitled, "Grant of Zoning with Conditions-Authorized," to Authorize the Imposition of Certain Restrictions, Conditions, or Limitations Upon Zoning or Rezoning as Authorized Under Article 66B, Section 4.01 of the Maryland Code

SUPPORTING BACKGROUND:

This text amendment was prepared by the City Attorney in response to a recent Maryland Court of Appeals decision that concluded that while municipalities in Euclidean zones could *not* impose conditions related to use in connection with a zoning approval, cities *can* impose conditional zoning on approvals with conditions that relate to design of buildings, landscaping or other improvements, alterations and change on the land. Article 66B Section 4.01 allows a municipality to take such action; however, the City must first grant itself the authority to do so under the provision of State law.

The subject text amendment accomplishes this by following the requirements of state law. This power is not needed for the City's floating zones (i.e. MXD, C-D and CBD zones); however, most of the City's zones are Euclidean in nature. Euclidean zones contain fixed standards and permit certain land uses by right and are recognized as the oldest type of zoning. Floating zones like the MXD, C-D and CBD zones are generally thought as more flexible in terms of standards and requirements than Euclidean zones and, therefore, often encourage more creative design.

Please see attached memo from Mr. Abrams dated January 7, 2003, which further outlines the basis for the text amendment, and the memorandum from Mr. Abrams dated January 7, 2003, which outlines the specific nature of the landmark zoning decision rendered by the Maryland Court of Appeals which has precipitated this action.

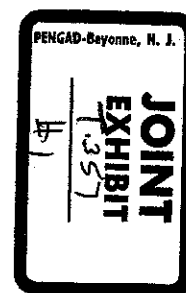
DESIRED OUTCOME:

**Planning Commission hold record open for 15 days.
Mayor & Council hold record open for 28 days.**

TEXT AMENDMENT TO THE ZONING ORDINANCE

In accordance with Article VIII,
Section 24-194, 195, 197, and 198 of the City Code

Application Number	<u>T-357</u>
Filing Date	<u>2-24-03</u>
P.C. Hearing	_____
M&C Hearing	<u>Jt. 3-17-03</u>
Decision	_____
Decision Date	_____



Application is hereby made to the

- ☐ City Planning Commission, or
☒ Mayor and City Council

for a change in the text of the Zoning Ordinance of the City of Gaithersburg, Maryland.

This change involves Article VIII, Section 24-196.1
to be amended per the attached ordinance.

Applicant/Staff Person Jennifer Russel Date 2-24-03

Address _____



ORDINANCE No. _____

AN ORDINANCE TO AMEND CHAPTER 24 OF THE CITY CODE (CITY ZONING ORDINANCE), ARTICLE VIII, ENTITLED, "AMENDMENT PROCEDURE," SO AS TO CREATE NEW §24-196.1 ENTITLED, "GRANT OF ZONING WITH CONDITIONS – AUTHORIZED," TO AUTHORIZE THE IMPOSITION OF CERTAIN RESTRICTIONS, CONDITIONS, OR LIMITATIONS UPON ZONING OR REZONING AS AUTHORIZED UNDER ARTICLE 66B, §4.01 OF THE MARYLAND CODE.

Text Amendment No. T-357

BE IT ORDAINED, by the Mayor and City Council of the City of Gaithersburg, Maryland, in public meeting assembled that there is hereby enacted an amendment to Chapter 24, Article VIII, of the City Code to create new § 24-196.1, entitled "Grant of Zoning with Conditions – Authorized," to read as follows:

ARTICLE VIII. AMENDMENT PROCEDURE

Sec. 24-196.1. Grant of Zoning with Conditions – Authorized.

a) Upon the zoning or rezoning of any land, whether by local map amendment, comprehensive zoning or zoning of newly annexed land, the City Council is authorized to impose as part of such approval restrictions, conditions, and limitations upon the design of buildings and structures, landscaping or other improvements, alterations and changes made or to be made upon the land to be rezoned which the Council deems appropriate to preserve, improve or protect the subject property or adjacent lands and improvements.

b) Prior to approval of any zoning or rezoning with restrictions, conditions, or limitations, the City Council shall provide notice of public hearing as provided for in this Chapter for map amendments.

c) Any restrictions, conditions, and limitations imposed under this section shall be enforced by the City Planning Commission through the Site Development Plan approval provisions of Article V of this Chapter 24.

ADOPTED by the City Council of Gaithersburg, Maryland this ____ day of _____, 2003.

DELIVERED to the Mayor of the City of Gaithersburg, Maryland this ____ day of _____, 2003.

SIDNEY A. KATZ, Mayor

THIS IS TO CERTIFY that the foregoing Ordinance was adopted by the City Council of Gaithersburg, in public meeting assembled, on the ____ day of _____, 2003, and the same was approved by the Mayor of the City of Gaithersburg on the ____ day of _____, 2003. This Ordinance will become effective on the ____ day of _____, 2003.

DAVID B. HUMPTON, City Manager



February 24, 2003



Karey Major, Law Section
The Gaithersburg Gazette
P.O. Caller 6006
Gaithersburg, Maryland 20884

Dear Karey:

Please publish the following legal advertisement in the **February 26 and March 5, 2003**, issues of the *Gaithersburg Gazette*.

Sincerely,

Jennifer Russel, Director
Planning and Code Administration

ASSIGN CODE: T-357 Acct# 133649

NOTICE OF PUBLIC HEARING

The Mayor and Council and Planning Commission of the City of Gaithersburg will conduct a joint public hearing on T-357, filed by Jennifer Russel for the Mayor and City Council, on

**MONDAY
MARCH 17, 2003
AT 7:30 P.M.**

or as soon thereafter as this matter can be heard in the Council Chambers at 31 South Summit Avenue, Gaithersburg, Maryland.

The application requests amendment of Chapter 24 of the City Code (City Zoning Ordinance), Article VIII, entitled, "Amendment Procedure," so as to create new §24-196.1 entitled, "Grant of Zoning with Conditions - Authorized," to authorize the imposition of certain restrictions, conditions or limitations upon zoning or rezoning as authorized under Article 66B, §4.01 of the Maryland Code.

Further information may be obtained from the Planning and Code Administration Department at City Hall, 31 South Summit Avenue, between the hours of 8 a.m. and 5 p.m., Monday through Friday.

Jennifer Russel, Director
Planning and Code Administration
mg

City of Gaithersburg • 31 South Summit Avenue, Gaithersburg, Maryland 20877-2098
301-258-6300 • FAX 301-948-6149 • TTY 301-258-6430 • cityhall@ci.gaithersburg.md.us • www.ci.gaithersburg.md.us

MAYOR
Sidney A. Katz

COUNCIL MEMBERS
Stanley J. Alster
Geraldine E. Edens
Henry F. Marraffa, Jr.
John B. Schlichting
Ann T. Somerset

CITY MANAGER
David B. Humpton



CITY OF GAITHERSBURG
31 South Summit Avenue
Gaithersburg, Maryland 20877
Telephone: 301-258-6330

NOTICE OF JOINT PUBLIC HEARING

The City of Gaithersburg Mayor and Council and Planning Commission will conduct a public hearing at the time and place noted below.

Meeting: MAYOR AND CITY COUNCIL
Application Type: T-357
Applicant: JENNIFER RUSSEL FOR THE MAYOR & CITY COUNCIL
Day/ Date/Time: MONDAY, MARCH 17, 2003, 7:30 P.M.
Place: COUNCIL CHAMBERS, GAITHERSBURG CITY HALL
31 SOUTH SUMMIT AVENUE

*****IMPORTANT*****

The application requests amendment of Chapter 24 of the City Code (City Zoning Ordinance), Article VIII, entitled, "Amendment Procedure," so as to create new §24-196.1 entitled, "Grant of Zoning with Conditions - Authorized," to authorize the imposition of certain restrictions, conditions or limitations upon zoning or rezoning as authorized under Article 66B, §4.01 of the Maryland Code. This is the first public hearing in a series of public opportunities to participate. Contact the Planning and Code Administration City Planner (listed below) at (301) 258-6330 if you should have any questions and/or to learn more about this process and your ability to offer testimony and input.

Joint Mayor and City Council & Planning Commission meetings can be viewed live on Gaithersburg Cable Television Channel 13, and at anytime (on demand) two weeks after the public hearing via the Internet and Web TV at <http://www.ci.gaithersburg.md.us>.

CITY OF GAITHERSBURG

By: Jennifer Russel
Jennifer Russel, Director
Planning and Code Administration

NOTICES SENT THIS FEBRUARY 27, 2003, TO:

APPLICANT AND INTERESTED PARTIES

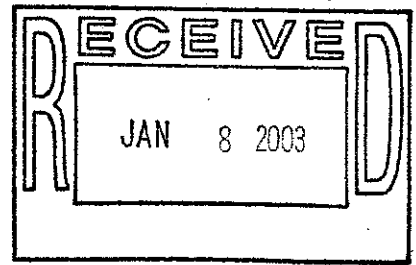
(A list of interested parties and agencies is available in the file in the Planning and Code Administration.)

MAYOR AND COUNCIL

PLANNING COMMISSION


CITY STAFF

David B. Humpton, City Manager
Frederick J. Felton, Assistant City Manager
Tony Tomasello, Assistant City Manager
Stanley D. Abrams, City Attorney
Mary Beth Smith, Public Information Director
Doris Stokes, Administrative Assistant
Jeff Baldwin, City Web Administrator (via email)



MEMORANDUM

TO: Mayor, City Council and City Manager

FROM: Stanley D. Abrams, City Attorney 

SUBJECT: Recent Annexation/Zoning Decision of Maryland Court of Appeals
(Mayor and Council of Rockville, et al. v. Rylens Enterprises, Inc.
Decided December 31, 2002).

DATE: January 7, 2003



The Maryland Court of Appeals rendered a landmark decision (some 70 pages in length, with a 64 page dissent) relating to the zoning by a municipality of annexed property and what conditions may be attached to the zoning of the property. This memorandum will summarize the facts, issues and holding as guidance in future annexations and zoning of annexed property.

FACTS

In May, 1997 the owners of I-2 (heavy industrial) zoned land in the County, sought annexation into Rockville because the County's I-2 Zone did not allow the intended use (ie: auto filling station). The petitioner requested that upon annexation that the property be rezoned to the City's I-1 Zone which allowed the intended use by special exception. Since the City's I-1 Zone was substantially different than what the County Master Plan recommended (ie: I-2 Zone) for the property, the City had to receive under State law (Art. 23A §9(c)) consent of the County Council to zone the property I-1. In July, 1998 the County Council disapproved the petitioner/owner request because the County didn't want retail uses at that location and the City's I-1 Zone allowed numerous retail uses in addition to auto filling stations.

Undeterred, the owners and the City of Rockville, in 1999 again sought approval of the County Council to allow I-1 Zoning on the property and the County Council reversed itself and consented with the following condition:

“That the City prohibits the retail use of the site, except for a gasoline service station”.

Following this consent, the owner/petitioner and the City entered into an annexation agreement with the provision that the property could not be used for any retail purpose, other than a gasoline service station. The City thereupon approved the annexation and by separate ordinance rezoned the property to the City's I-1 Zone. An adjacent property owner who operates a gasoline service station appealed the rezoning (not the annexation resolution) alleging the zoning to be impermissible conditional zoning. The Circuit Court agreed with the appellant and reversed the City's zoning finding that it was impermissible conditional zoning as well as an unlawful spot zoning. An appeal was taken to the Court of Special Appeals which affirmed the Circuit Court decision. The case was thereafter accepted by the Maryland Court of Appeals.

HOLDING – Lower Courts Affirmed and Zoning Found to Be Invalid.

Even though the ordinance rezoning the property made no reference to the limitations on use, it was explicit in the annexation agreement and therefore constituted both impermissible conditional zoning and contract zoning.

While some conditional zoning is authorized under Article 66B §4.01(c) Md. Code Ann. as it relates to imposing additional restrictions and conditions on design and construction of buildings and landscaping (ie: structural and architectural character of land and improvements), State law does not authorize the imposition of restrictions and conditions on use or conditional use rezoning. State law does not authorize utilizing conditions to limit permissible "uses" and therefore:

"Conditional zoning which acts as a limitation as to otherwise permissible uses is not permitted under Article 66B".

The Court noted that without the conditional use zoning limitation the requirement in Article 66B §4.02 which requires uniformity within the class or development in a district would be violated. The purpose of the uniformity requirement is to protect the rights of property owners and ensure fair and equal treatment by local authorities.

The Court noted that it did not matter whether the zoning was piecemeal zoning or original zoning there was no grant of authority from the State for conditional use zoning. The Court ruled that a limitation in the annexation agreement restricting certain uses on newly annexed property is impermissible conditional zoning and further that here it is also impermissible contract zoning as well.¹ The language in the ordinance establishing the zoning referencing the use limiting conditions in the annexation agreement as the basis for the zoning action was contract zoning as well and it did not matter whether the agreement was part of the zoning or annexation process:

"On the facts of this case, the zoning of the subject property by the City of Rockville involved the placement of use limitations on the

¹ Illegal contract zoning involves the process whereby local government enters into an agreement with a developer where the government exacts a promise from the developer in exchange for its agreement to rezone the property.

zoning which constituted impermissible conditional use zoning, and the mechanism used by the City of Rockville to place those impermissible conditions on the property further constituted impermissible contract zoning.”²

The Court concluded its decision by indicating that since the zoning assigned was improper, the current zoning classification of the annexed property was still the I-2 Zoning of the County. Express county approval was not received of the zoning because that approval contained the “use” limitation. Therefore after the five year limitation period (Article 23A §9(c)(2)), the municipality must prove “change/mistake” unless the municipality rezones the newly annexed parcel to a floating zone or as part of a comprehensive zoning of a larger area. Until that occurs, the zoning of the property is the one assigned by the pre-annexation jurisdiction (ie: Montgomery County). On this issue the Court stated:

“The language of §9 [of the Article 23A] clearly indicates that it is intended that the pre-annexation zoning remain in effect until: (1) the annexing municipality grants a new zone substantially consistent with the pertinent plan recommendation of the pre-annexation jurisdiction; or (2) the pre-annexation jurisdiction grants permission for the annexing municipality to establish a substantially inconsistent zone; or (3) the five year period expires.”

CONCLUSION

The City when annexing property and entering into an annexation agreement may not when establishing Euclidean zoning for the property limit or exclude certain uses in the agreement or establishment of the zoning which are permissible within the classification sought. I believe we may still include limits on density, building height, size and coverage, setbacks, parking and establish terms for landscaping, public facilities improvements, dedications, etc.

Further, this decision appears to cover the establishment of Euclidean Zones, where the “change/mistake” rules apply. While the City has applied the Euclidean zoning test to all piecemeal zonings, we do have three zones which have all of the attributes of “floating” zones. These include: MXD, CBD & CD Zones. In a floating zone the test for rezoning is not change in the character of the neighborhood or mistake in the existing zoning but:

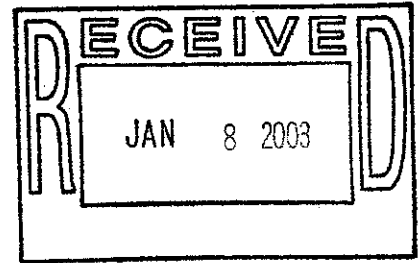
- (1) Does the requested zone comply with the purposes of the zone as stated in the zoning ordinance; and

² The Court opinion in a footnote (f.n. 43) did however point out that annexation agreements can include the zoning to be assigned to a property as long as those portions of the agreement, as here, did not violate other legal requirements such as the prohibition against conditional zoning (i.e.: specifying a specific use or prohibiting certain uses otherwise allowed in the requested zone).


- (2) Compatibility with existing and planned land use in the surrounding area.
- (3) Harmony with the area master plan and impact on public facilities which are also considered in Euclidean Zone case.

Should you desire these three zones to be evaluated as floating zones staff should be informed for future applications.

I include a copy of the opinion but due to its length, I leave it up to the City Manager to determine distribution. I would however point out that the verbiage at the bottom of page 19 and top of page 20 of the opinion were not solicited or paid for by this writer.



MEMORANDUM

TO: Mayor, City Council and City Manager
FROM: Stanley D. Abrams, City Attorney 
SUBJECT: Request for Introduction of Zoning Text Amendment
DATE: January 7, 2003



The recent Maryland Court of Appeals decision in Mayor & Council of Rockville, et al. v. Rylyns Enterprises, Inc. (decided 12/31/02) which I described to you in previous memo determined that while municipalities in Euclidean Zone (not floating or PUD type zones) cases could not specifically impose restrictions or conditions on use as part of a zoning approval, they can under Art. 66B §4.01 impose conditional zoning on the approvals in the form of restrictions and conditions relating to design of buildings, landscaping or other improvements, alterations and changes to be upon the land to be rezoned. The City must grant itself the authority to do this under the provisions of state law. Consequently, I have attached a zoning text amendment which follows the requirements of state law for introduction should you so desire.

We can impose these restrictions as well as restrictions on use in the case of the MXD, CD & CBD Zones because they are essentially floating or PUD type zones. However all other zones in the City are Euclidean in nature and if we desire to impose non-use conditions or restrictions at the time of zoning we should avail ourselves of this authority in the manner prescribed by Article 66B §4.01. This authority could cover local map amendments, comprehensive zoning and zoning at the time of annexation.

This is basically a complement and expansion of the review authority we have enacted under the "special conditions" provisions of §24-170A of the City Zoning Ordinance which requires the Planning Commission to approve a site development plan for properties identified in a master plan which have special conditions only upon a finding that the site plan conforms to the master plan special conditions.

Should you have any questions, I would be pleased to respond.

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